In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1846

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY;
AND THE STATE OF NEW HAMPSHIRE,
Appellants

v.

THE HONORABLE E. RAY MARSHALL, SECRETARY OF LABOR
OF THE UNITED STATES; AND THE UNITED STATES
DEPARTMENT OF LABOR,
Appellees

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

Gregory H. Smith
Acting Attorney General

James E. Morris
Assistant Attorney General
State House Annex
Concord, New Hampshire
03301
Counsel for the State
of New Hampshire

Edward F. Smith
General Counsel

Charles G. Cleaveland
of Counsel

For the New Hampshire
Department of Employment
Security
32 South Main Street
Concord, New Hampshire

May 20, 1980

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United States Court of Appeals
For the First Circuit

No. 78-1564

STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

PETITIONERS,

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES, AND THE UNITED STATES DEPARTMENT OF LABOR,

RESPONDENTS.

ON PETITION FOR REVIEW OF THE DECISION OF THE SECRETARY OF LABOR OF THE UNITED STATES

Before

CAMPBELL and BOWNES, *Circuit Judges*,
DEVINE, *District Judge*.*

Charles S. Rhyne and *James E. Morris*, with whom *Edward F. Smith*, General Counsel, *Paul V. Kenneally*, *William S. Rhyne*, *Martin W. Matzen*, *Stephen P. Elmendorf*, and *Rhyne & Rhyne*, were on brief, for petitioners.

Robert T. Duffy, Attorney, Tax Division, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, *Gilbert E. Andrews* and *Leonard J. Henzke, Jr.*, Attorneys, Tax Division, Department of Justice, were on brief, for respondents.

George Kaufmann, with whom *Zwerdling and Maurer*, *A.L. Zwerdling*, *Janet Kohn*, *Leonard Lesser*, *J. Albert Woll*, General Counsel, AFL-CIO, *Laurence Gold*, Special Counsel, AFL-CIO, and *Edward J. Hickey*, General Counsel, Public Employee Dept., AFL-CIO, were on brief, for American Federation of Labor, et al., amici curiae.

Richard M. Flynn, *Charles S. Rhyne*, *William S. Rhyne*, *Martin W. Matzen*, *Stephen P. Elmendorf*, and *Rhyne and Rhyne*, on brief for Business and Industry Association of New Hampshire, et al., amici curiae.

*Of the District of New Hampshire, sitting by designation.

February 20, 1980

BOWNES, *Circuit Judge*. This is an appeal pursuant to 26 U.S.C. § 3310[1] of the decision of the Secretary of Labor that the New Hampshire Unemployment Compensation law fails to conform in six separate respects with the requirements of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311.

In order to understand the issues involved, some explanation of the unemployment compensation law is necessary. The law has its roots in the Great Depression when unemployment was so widespread that the separate states were unable to meet the basic needs of their citizens. Several states, of which Wisconsin was the leader and New Hampshire an early follower, enacted their own unemployment insurance programs. The financing for these programs was obtained mainly by a tax on private employers. Many states, however, refused to enact such programs fearing that the tax on local employers would cause them to flee to other states which did not have such a law. The federal unemployment insurance law was thus devised to meet a national problem. The constraints of federalism and the dictates of practical politics resulted in legislation designed to equalize the burden on the states with full participation by all. This was accomplished by the inducement of tax credits to private employers and outright grants made available to the states to help defray the administrative costs of the program. The tax on the private employer was levied and collected by the state. The moneys collected had to be promptly remitted by the states to the Secretary of the Treasury. A credit of up to 90% of the tax due was given the employer if he had made

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[1]We understand that this is the first appeal under 26 U.S.C. § 3310, which provides in pertinent part:

> (a) *In general.*— Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located of with the United States Court of Appeals for the District of Columbia, a petition for review of such action.

contributions to his state's unemployment insurance fund. The tax credit and the grants were contingent on certification by the Secretary of Labor that the state had enacted an unemployment compensation program that conformed to federal statutory requirements.

There was no direct statutory command to the states requiring them to conform to federal law. The federal government made an offer to the states which they could accept or refuse. Up until now, all the states found the combination of tax credits to its private employers and outright grants in return for conforming legislation an offer that could not be refused.[2]

Although the Act has been extensively amended since its inception in 1935, the basic design and statutory machinery have remained constant. The present statutory machinery works as follows. Under 26 U.S.C. §§ 3301 and 3306(b)(1), private employers are taxed an amount equal to 3.4 percent of the first $6,000 in wages paid each employee. 26 U.S.C. § 3302(a)(1) allows a credit of up to 2.7 percent of such wages against the tax for the employer's contribution to an unemployment fund maintained under state law. But the employer can obtain this credit only if the state's unemployment law is certified by the Secretary of Labor as provided in 26 U.S.C. § 3304.

26 U.S.C. § 3304(a) requires that the Secretary of Labor approve any state unemployment compensation law that conforms to the federal requirements. Section 3304(b) requires the Secretary to notify the governor of the state of such approval, and section 3304(c) requires the Secretary to certify such approval to the Secretary of the Treasury. Failure to obtain certification means not only the loss of FUTA tax credits for private employers, but also the loss to noncertified states of two kinds of federal grants. One grant goes towards the cost of

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[2]For a full discussion of the genesis of the unemployment insurance program and its statutory mechanism, see *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937), and *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937).

administering the state's unemployment compensation program. 42 U.S.C. §§ 501-503. The other goes towards the administration of public employment offices which provide for job-finding, employment recruiting and other services. 29 U.S.C. §§ 49-49n.

Coverage under the unemployment compensation law was modified, restricted and expanded in 1976 by amendments to FUTA. The changes that concern us are as follows.

1. Employees of a state and its political subdivisions were required to be covered. 26 U.S.C. § 3304(a)(6)(A), 26 U.S.C. § 3309(a)(1)(B), and 26 U.S.C. § 3306(c)(7).

2. Coverage was extended to the employees of nonprofit schools which are not institutions of higher learning. 26 U.S.C. § 3304(a)(6)(A), 26 U.S.C. § 3309(a)(1)(A), and 26 U.S.C. § 3306(c)(8).

3. Political subdivisions of a state were given the option of reimbursing the state for unemployment benefits paid to former employees in lieu of making payments in the same manner as private sector employees. 26 U.S.C. § 3304(a)(6)(B) and 26 U.S.C. § 3309(a)(2).

4. 26 U.S.C. § 3304(a)(14)(A), (B) and (C) restricted the coverage of aliens, requried uniform reporting of alien status data and imposed the preponderance of the evidence test for denying compensation based on alien status. Under 26 U.S.C. § 3304(a)(9)(A), denial of compensation to an alien from a country contiguous to the state of employment solely on the basis that he filed another claim in that country was forbidden.

5. Coverage afforded to professional athletes was restricted by prohibiting the payments of benefits between athletic seasons. 26 U.S.C. § 3304(a)(13).

6. The coverage of employees of educational institutions was modified in regard to the coverage of professional and non-professional employees between academic terms or years, and during vacation periods and vacation recesses. 26 U.S.C. § 3304(a)(6)(A).

This case was precipitated by the veto on June 23, 1978, by the then governor of New Hampshire, of a bill that was intended to bring the New Hampshire Unemployment Compensation law into conformity with the provisions of 26 U.S.C. § 3304. The state had amended its unemployment compensation law, effective January 1, 1978, in an effort to conform with the 1976 amendments. It was notified by the Secretary of Labor in February of 1978 that he had serious questions as to whether this law conformed with federal requirements. This led to the June, 1978, legislation, the veto of which was accepted by the legislature.

After the veto of the conformity legislation, a hearing pursuant to 26 U.S.C. § 3304(c), was scheduled by the Department of Labor on whether New Hampshire was in conformity in regard to the five categories of coverage and the optional payment provision for political subdivisions of the state. The hearing was held on September 14 and 15, 1978. In addition to the six conformity issues, New Hampshire challenged the constitutionality of the 1976 amendments as they related to coverage of the employees of a state and its political subdivision. Indeed, almost all of the evidence introduced by New Hampshire focused on the constitutional issue. The administrative law judge (ALJ) found that New Hampshire's unemployment law failed to conform with federal law in all six respects claimed by the Secretary. He made findings of fact as to the constitutional issue, but made no ruling thereon. In reviewing the opinion of the ALJ, the Secretary made additional findings, modified a conclusion of law, corrected some errors and then adopted the findings of facts and conclusions of law of the ALJ as his own.*

*On June 23, 1979, New Hampshire enacted House Bill 808 in an attempt to conform with the 1976 FUTA amendments. We asked for briefs on the question of whether this legislation rendered the case moot. The State of New Hampshire, in a brief by its Attorney General, urged that the case was moot. The other parties, the Department of Labor, the State of New Hampshire Department of Employment Security, and the Amicus took the position that the case was not moot.

The parties differ on the scope of our review. Petitioners focus on the constitutionality of the 1976 amendments while respondents assert that, if we uphold the findings of statutory violations, we need not and should not reach the constitutional issue. While the course suggested by respondents is tempting, we feel that we must decide both the conformity and constitutional issues.

The state did not meet the conformity requirements of 26 U.S.C. § 3304, nor does it so claim. As already noted, it introduced practically no evidence at the hearing on conformity and did not urge that it had complied with the law. New Hampshire's brief is devoted almost exclusively to the constitutional question. In fact, it admits nonconformity by stating, "New Hampshire has failed to satisfy the Secretary as to the requirements of the 1976 amendments, solely because of its

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Our examination of the bill and subsequent events convince us that the case is not moot. House Bill 808 did provide a framework for bringing New Hampshire into conformity with FUTA. The legislation alone, however, could not bring New Hampshire into full compliance. Conforming rules and regulations had to be promulgated by the New Hampshire Department of Employment Security to flesh out the bare bones legislation. These required the approval of the Secretary of Labor. In addition, administrative action by New Hampshire was necessary to give such rules and regulations retroactive effect. The parties attempted for months to agree on the rules and regulations and administrative action for implementing House Bill 808 and bringing New Hampshire into conformity with the FUTA amendments. The State of New Hampshire and the Department of Labor did agree on conforming rules and regulations and a judgment was prepared embodying them. The New Hampshire Department of Employment Security, however, refused to approve the judgment agreed upon by the Department of Labor and the State. Since the judgment had to be implemented by the New Hampshire Department of Employment Security and since this department is completely autonomous, there can be no settlement without its approval.

It must also be noted that House Bill 808's statement of purpose expresses clearly and forcibly the opinion of the New Hampshire Legislature that it had no other alternative but to accede to this "federal intrusion of its sovereignty" and that the legislation was enacted "under duress and for no other reason."

refusal to amend its law to accommodate the unconstitutional public sector program financing requirements." Brief at 66. This admission is repeated in its supplemental brief at 11.

This is clearly not the type of case where statutory interpretation makes it unnecessary to meet the constitutional issues. New Hampshire made it clear before the ALJ at the hearing, and before us, that it was refusing to conform because it felt that the statute itself was unconstitutional. New Hampshire's decision to put all its eggs in the constitutional basket, however, does not mean that we can avoid our statutory duty of review of the Secretary's order. *See New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979). We must determine whether there is substantial evidence on the record to support the Secretary's findings.[3]

The evidence presented at the hearing can be summarized as follows. New Hampshire was advised during the period October 21, 1976, through June 24, 1978, by the Department of Labor what amendments would be necessary to bring its unemployment compensation law into conformity with 26 U.S.C. § 3304. The Department of Labor specifically informed the state that its law was deficient in the six categories already outlined.

The evidence was uncontradicted that, although New Hampshire has provided full unemployment insurance coverage for its permanent and classified civil service employees, temporary and seasonal workers and those not classified are not covered. N.H. Rev. Stat. Ann. § 282:1-H(4)(g) and (q) specifically exclude from coverage employees of political subdivisions and nonclassified state workers. The finding of the Secretary that New Hampshire did not meet the requirements of federal law as to coverage of employees of the state and its political subdivisions was clearly correct. This finding is also the basis for the Secretary's deter-

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[3]26 U.S.C. § 3310(b) provides in pertinent part:

> (b) *Findings of fact.*—The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive[.]

mination that the option provisions of the federal statute were not met because, under New Hampshire law, N.H. Rev. Stat. Ann. § 282:6-A-2, payments into the unemployment compensation fund by political subdivisions of the state were limited to those who had elected coverage.

N.H. Rev. Stat. Ann. § 282:1-H(4)(s)(3) specifically excludes from coverage those "in the employ of a school which is not an institution of higher education." This is directly contrary to the 1976 FUTA amendment which requires the states to cover employees of nonprofit schools below the level of institutions of higher education.

Under subsections (B) and (C) of 26 U.S.C. § 3304(a)(14), information as to alien status must be uniformly required from all compensation applicants, and a state agency can only deny compensation because of alien status on a preponderance of the evidence. New Hampshire law does not have any alien status conforming provisions. Under N.H. Rev. Stat. Ann. § 282:1-N(1)(a), it is specified that wages shall not include the amount of any payment to an alien unless he was in the United States under color of law. The Secretary found this provision was ambiguous and might conflict with federal law relative to aliens from a country contiguous to that of the state in which he is employed. We agree.

The Secretary properly found that, under New Hampshire law, N.H. Rev. Stat. Ann. § 282:1-0, payments to athletes between seasons were not prohibited as required by federal law, but only reduced by eliminating the sports income from the athlete's base period earnings.

The Secretary's findings as to employees of educational institutions are based on a restricted and technical reading of the federal statutory provisions. If this were the only issue, we might be persuaded to find that New Hampshire was in substantial compliance, but the broad provisions of the New Hampshire statute, N.H. Rev. Stat. Ann. § 282:3-F, leave too much to interpretation and construction to satisfy the tight federal requirements.

We uphold the decision of the administrative law judge, as modified and adopted by the Secretary, that New Hampshire's Unemployment Compensation law was in the six respects specified not in conformity with the requirements of the implicated 1976 amendements to FUTA.

The constitutional issue can be stated thusly: do the 1976 amendments to FUTA violate the sovereign integrity of the states and impair their ability to function effectively under the federal system as guaranteed by the tenth amendment.

The basic question is whether this case falls within the new furrow ploughed by *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), or follows in the wake of *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). In *Usery*, the Supreme Court, in a five to four decision, overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968),[4] and held that the 1974 amendments of the Fair Labor Standards Act (FLSA) extending its provisions to employees of the states and their political subdivisions were unconstitutional and prohibited by the tenth amendment. Petitioners urge that its holding and rationale also doom the 1976 FUTA amendments which apply to the same employee groups.

We note first that only two of the six nonconformity findings implicate the tenth amendment, the one pertaining to coverage of employees of the state and its political subdivisions[5] and the option given these entities relative to the method of payment.[6]

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[4]"While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are, therefore, persuaded that *Wirtz* must be overruled." *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976).

[5]The other four nonconformity findings are limited to the private sector. New Hampshire, in its latest brief, acknowledges its duty to conform to the 1976 amendments as they apply to the private sector, but argues that respondent Secretary waived these requirements pending resolution of the constitutional issue. The Secretary denied any waiver and argues that New Hampshire is precluded from asserting a waiver since it was not raised below. We find no evidence of a waiver by the Secretary.

Our analysis begins with the obvious; that we are dealing with a different federal statute and, more importantly, a different regulatory method than was at issue in *Usery*. The minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA) invalidated in *Usery* were imposed on the states by command. The authority for such command rested on the commerce clause. On the other hand, the 1976 FUTA amendments, following the design of the original Act, were not based on the commerce clause and were not directly imposed on the states which had the option of conforming or not.

There is no doubt that *Usery* focused on the command of the FLSA amendments that the states must adopt the maximum hours and minimum wage provisions for its own employees.

> The Act, speaking directly to the states *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress.

National League of Cities v. *Usery, supra*, 426 U.S. at 847-48.

> But, like the minimum wage provisions, the vice of the Act as sought to be applied here is that it directly penalizes the states for choosing to hire governmental employees on terms different from those which Congress has sought to impose.

Id. at 849.

This command to the state is given bite by 29 U.S.C. § 216, which provides for both civil and criminal penalties in the event of a violation.

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[6]For purposes of this discussion, we include public school employees as employees of political subdivisions of the state. We are aware, of course, that in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), the Supreme Court held that a local school board was not an arm of the state and, therefore, not entitled to invoke the bar of the eleventh amendment. *Id.* at 280-81. We do not think, however, that this limitation applies to the tenth amendment.

In contrast, the basic premise and statutory scheme of the federal-state unemployment compensation program, which have remained unchanged since 1935, are based on the concept that a state is free to accept federal conditions by conforming to federal statutory requirements or can refuse to participate entirely. Unlike the legislation at issue in *Usery* and *Maryland* v. *Wirtz*, *supra*, the commerce clause is not implicated. Congress chose to advance this legislation through its spending power. In *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. 548 (1937), the validity of the tax on employers was upheld against constitutional attack. Mr. Justice Cardozo, writing for the majority, outlined the history and purpose of this historic legislation and held that "[t]he excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Id.* at 585. An attack on a state's (Alabama) conforming legislation on the ground that its enactment was coerced by the federal government was rebuffed in *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937).

Petitioners argue, however, that this option of the state to refuse to participate in the program is illusory, since the severe financial consequences that would follow such refusal negate any real choice. Petitioners assert that, while the 1976 federal statutory requirements are not imposed by fiat, as with the 1974 amendments to the FLSA, the coercive effect is the same. This is particularly so, they contend, because most of the financial burden for a state's decision not to conform falls on its private employers through loss of federal tax credits. All parties agree that the cost to the private employers in New Hampshire will be about forty million dollars in 1978 tax credits. It is argued that by holding the private employers "ransom," Congress coerces compliance.

We do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game.[7] The basic

[7]New Hampshire is the only state that has opted not to conform. It

design and mechanism of the Act have not changed since 1935. Its coverage has been extended,[8] but the percentage of tax credits remains essentially the same.[9] The primary reason, of course, for the increase in the dollar amount of tax credits has been the expansion of our economy since 1935. The increase in the number of employers and employees and the amount paid in wages has meant a corresponding increase in the dollar amount of tax credits.

We must also recognize that, since 1935, the philosophy and objective of the unemployment compensation program, *viz.*, that unemployment is a national problem that must be dealt with on a national basis, have been woven into the fabric of our society.[10]

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repeatedly stresses in its brief the burden on the state's employers if the Act is held constitutional. We observe that it is easy to gamble for high stakes when the money on the table comes from someone else's pocket.

[8]The categories of employees has expanded. Single employees are now covered. Federal civilian employees were included in 1954 with provisions to reimburse the states for the benefits paid and the administrative costs. In 1966, federal military personnel were covered. In 1970, conformity requirements were passed to extend coverage to employees of large nonprofit organizations and employees of state hospitals and state institutions of higher learning. The 1976 amendments extended the tax to farms which employ ten or more workers for certain time periods or pay at least $20,000 in wages in any calendar quarter. 29 U.S.C. § 3306(a)(2). Under 26 U.S.C. § 3306(a)(3), employees of domestic workers were included.

[9]Originally, FUTA was based on the total wages of each employee. In 1940, the tax was limited to the first $3,000 of each employee's wages. At present, the tax base is the first $6,000 of wages. Unemployment Compensation Amendments of 1976. The tax rate has gone from 3.0 percent to its present rate of 3.4 percent; the tax credit has remained constant at 2.7 percent.

[10]In the Emergency Unemployment Compensation Act of 1974, Congress extended emergency benefits for individuals who had exhausted their regular benefits during a period of high unemployment. Although emergency benefits were funded entirely by the federal government, only certified states could participate in the program. The Emergency Jobs and Unemployment Assistance Act of 1974 provided unemployment benefits for individuals generally not covered under the regular program, *i.e.*, agricultural and domestic

In *Usery*, the Court specifically refrained from deciding whether the spending power could be unconstitutionally used to impair state sovereignty:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

National League of Cities v. *Usery*, 426 U.S. at 852 n.17.

We construe *Usery* to hold that congressional legislation based upon the commerce clause which impairs the sovereign functions of the states is unconstitutional. Two other circuits have refused to extend the *Usery* doctrine to legislation not squarely bottomed on the commerce clause. In *Usery* v. *Charlestown City School District*, 558 F.2d 1169 (4th Cir. 1977), and in *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977), the courts rejected arguments that, in light of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Equal Pay Act was

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workers and employees of state and local governments. This program was fully funded by the federal government, but was payable only in areas designated by the Secretary of Labor during periods of high unemployment. During fiscal 1976, the federal government paid about 3.4 billion dollars in emergency benefits. U.S. Dept. of Labor, Sixty-Fourth Annual Report 12-13 (1976). Federal grants to the states for the administration of their unemployment compensation program amounted to over $9,000,000 for fiscal 1977. 1 House Hearings before SubComm. of Comm. on Appropriations, 95th Cong. 2d Sess. 191 (1978). When state reserves are insufficient to meet the need for benefit payments, the federal government through the unemployment trust fund lends the needed funds to the state. Such loans are interest free. As of February 1, 1978, there were outstanding loans to twenty-one states in the aggregate amount of $4.9 billion. 1 House Hearings, *supra*, at 168-69. Federal appropriations of FUTA tax receipts to the unemployment trust fund amounted to over $1.5 billion in fiscal 1976, and almost $2 billion in fiscal 1977. The Budget of the U.S., Fiscal Year 1978, App. 508; The Budget of the U.S., Fiscal Year 1979, App. 621.

an unconstitutional exercise of congressional authority under the commerce clause. Both courts viewed the application of the Equal Pay Act to the states as a legitimate exercise of congressional authority to adopt legislation enforcing the fourteenth amendment's guaranty of equal protection of the law. Similarly, in *Arritt* v. *Grissell*, 567 F.2d 1267 (4th Cir. 1977), the court held that Congress enacted the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, under section 5 of the fourteenth amendment,[11] rejecting the contention that the ADEA was impermissibly grounded on the commerce clause.

The tax at issue here, FUTA, is not based on the power of Congress under the commerce clause. Congress has relied on the attraction of the federal purse to persuade the states that it is in their best interests to conform to a national unemployment insurance program. Inducing state participation in national progams by the offer of federal funds is not limited to the unemployment compensation program. In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978), the issue of the constitutionality of a conformity addition to the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300k *et seq.* was raised. In upholding the constitutionality of the Act, the court specificaly stated:

> It must be remembered that this Act is not compulsory on the State. Unlike the legislation faulted in *State of Maryland* v. *Environmental Protection Ag.*, *supra*, 530 F.2d 215, it does not impose a mandatory requirement to enact legislation on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not "coercive" in the constitutional sense (emphasis in original).

[11] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Id. at 535-36.

Under the Medicaid Act, Title XIX of the Social Security Act of 1965, participating states are enabled by the use of federal funds to provide medical services for welfare recipients. A state's participation in Medicaid is voluntary but, if it chooses to participate, its plan must conform to the requirements imposed by the Medicaid Act. *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121, 124 (1st Cir.), *cert. denied*, 47 U.S.L.W. 3745 (May 15, 1979).

Since it can be argued that *Usery* was based on two separate and distinct concepts, the tenth amendment supremacy over the commerce clause *and/or* the impairment of state sovereignty, we next consider the evidence presented at the Labor Department hearing on impairment of New Hampshire's sovereignty due to the cost of extending unemployment benefits to uncovered state employees and employees of its political subdivisions. The finance officer of the City of Manchester (New Hampshire's largest city) testified that over the past nine years no permanent employees had been laid off, but the cost of covering the City's temporary seasonal employees would require costly new staffing and record-keeping practices which would affect the ability of the City to maintain existing programs. The testimony of Elizabeth Puddington, a consultant to the New Hampshire School Boards Association, was that, because of New Hampshire's dependence on the property tax and the difficulties inherent in increasing revenues therefrom, the cost of extending unemployment benefits to public schools would probably result in a curtailment of educational programs.

The sale of liquor through state licensed stores is one of the main sources of state revenue. The Director of Merchandising and Accounts of the New Hampshire State Liquor Commission estimated that the cost of extending unemployment benefits to Commission employees would be $75,000-$80,000 annually with a potential cost of $120,000 annually. The Comptroller of the State testified that the annual cost under

the reimbursement method of financing unemployment benefits could amount to as much as $4.3 million and that, under the alternate contributing tax method, the cost would be about $300,000.

The cost to the New Hampshire Department of Employment Security for administering the additional coverage would be between $75,000 and $150,000 annually, according to the affidavit of its deputy commissioner. There was also affidavit testimony as to the additional cost to the Department of Health and Welfare - $30,528 and $4,830 for the Fish and Game Department.

The overall cost to New Hampshire and its political subdivisions for unemployment coverage was the subject of expert testimony at the hearing. Lennox L. Moak was the expert for the state. He testified that the additional cost to the state would be $200,000 and $900,000 for its political subdivisions, for a total of $1,100,000. Dr. James D. Van Erden testified as an expert for the Labor Department. He estimated that the total cost to New Hampshire and its political subdivisions for fiscal 1978 would amount to $227,585, for fiscal 1979, $288,935, and for fiscal 1980, $330,787.[12]

Unlike the effect of the wage and hour standards in *Usery*, we do not think that this evidence establishes that extending coverage to the employees of New Hampshire and its political subdivisions will "significantly alter or displace" the ability of New Hampshire "to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." *National League of Cities* v. *Usery*, 426 U.S. at 851. FUTA does not set the wage rates or affect hours worked. All it does is insure unemployment benefits for state employees. Its administration is entirely within the control of the state. *See Pearce* v.

[12]In reviewing the findings of the ALJ, the Secretary made the following conclusion of law, which we find to be correct. "Due to New Hampshire's base period and benefit year, all of the cost for FY 1978 and approximately one-half the cost for FY 1979 of extending coverage to state and local government employees could have been, at New Hampshire's option, covered by the Federal Government under the transition provision (Section 121) of the 1976 Amendments."

Wichita County, 590 F.2d 128 (5th Cir. 1979), and *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978), in which the Equal Pay Act was upheld as constitutional under the commerce clause on the grounds that, unlike the minimum wage provisions condemned in *Usery*, the provisions of the Equal Pay Act did not impermissibly interfere with the states' employment scheme.

We hold that the 1976 amendments to FUTA relative to employees of a state or its political subdivisions do not impair the sovereignty of New Hampshire and have not been rendered unconstitutional by *Usery*.

There is one more matter that requires our attention, the request of Amicus Los Angeles County to reconsider our order dismissing it as a named petitioner in the case. Our order is reaffirmed for lack of jurisdiction under 26 U.S.C. § 3310(a).[13] We must also note that Amicus is represented by the same attorneys representing the State of New Hampshire Department of Employment Security. By use of the Amicus format, the petitioner has had an opportunity to present its constitutional arguments exhaustively from every conceivable angle.

CAMPBELL, *Circuit Judge* (Concurring). Like my colleagues, I find substantial evidence to support the decision of the Secretary of Labor that New Hampshire's unemployment compensation law failed in six specific respects to conform to the 1976 federal amendments. *See* 26 U.S.C. § 3310(b). This being so, even if New Hampshire's constitutional challenge to

[13] 26 U.S.C. § 3310(a) provides in pertinent part:

> Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action.

the statutory provision requiring it to provide unemployment coverage to state and local employees were correct, the Secretary was nonetheless entitled to withhold funding. Given an adequate statutory ground upon which to uphold the Secretary's decision, I therefore believe it to be unnecessary and inappropriate to decide New Hampshire's constitutional challenge.

Under 26 U.S.C. § 3304(c), the Secretary is commanded by Congress to withhold certification from any state which the Secretary "finds has failed to amend its law so that it contains *each* of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 to be included therein." (Emphasis added.) As I read this law, if the state's enactment fails to conform to the federal requirements in even one material respect, the Secretary is required to withhold certification. New Hampshire concedes that its law has not been amended to conform to the federal requirements, and that the law is deficient in six different areas. The state's constitutional challenge, however, relates to only two of these areas, those involving coverage for public employees. Even were we to find this part of the federal act unconstitutional, as New Hampshire urges, we would nevertheless be constrained to affirm the decision of the Secretary insofar as it rests on the four provisions of the 1976 amendments that are undoubtedly constitutional.[1]

> As the Supreme Court has recently observed:
> " 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector*

[1]I think it is plain that *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), would foreclose any attempt by the state to argue that the federal act is unconstitutional in its application to private employers. Four of the requirements to which New Hampshire's statute was found not to conform concerned private employers only. See discussion in majority opinion at pp. 7-8.

> *Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105. Before deciding [a] constitutional question, it [is] incumbent on . . . courts to consider whether . . . statutory grounds might be dispositive."

New York Transit Authority v. *Beazer*, 440 U.S. 568, 582 (1979); *see also Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-69 (1947); *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Since the statutory ground in this case is entirely dispositive, I see no reason to follow the parties into collateral issues. If New Hampshire wished a ruling on its point of constitutional law, it should first have conformed its laws in all respects not implicating the constitutional issue.

I would add that apart from the reasons given above for avoiding constitutional adjudication, I take no particular exception to the court's decision.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

In the Matter of	*	
U.S. DEPARTMENT OF LABOR	*	
V.	*	CONFORMITY PROCEEDING
STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY	*	

DECISION OF THE SECRETARY

The Unemployment Compensation Law of the State of New Hampshire must be determined by the Secretary of Labor, by October 31, 1978, to be in conformity with the requirements of the Federal Unemployment Tax Act (26 U.S.C. 3301-3311), hereinafter referred to as FUTA in order to be certified under section 3304(c) of FUTA and thereby to have that State receive the benefits for itself and its inhabitants provided by Title III of the Social Security Act, 42 U.S.C. 501-504, and FUTA. Such benefits include federal grants for the administration of its unemployment compensation law as well as tax credits for

private employers within the State. The purpose of this proceeding is to determine whether the New Hampshire Unemployment Compensation Law is in conformity with the requirements of FUTA.

Pursuant to a notice published in the Federal Register (43 F.R. 26500, 36721, 42048) and rules of procedure incorporated therein, a hearing was held before an Administrative Law Judge, hereinafter sometimes referred to as the Judge, at which the parties were afforded the opportunity to examine witnesses and introduce documentary evidence relating to the issues of conformity as well as to the constitutionality of certain federal requirements. Thereafter, briefs and proposed findings of fact and conclusions of law were filed by the parties.

On October 13, 1978, the Judge issued a recommended decision in the matter, (hereinafter sometimes referred to as Rec. Dec. or R.D.), in which he found that the New Hampshire Unemployment Compensation Law is not in conformity with the requirements of FUTA with regard to each of

the six conformity issues (and sub-issues) specified in the notice of hearing. He also made findings of fact relating to the issues of constitutionality, in accordance with the rules of procedure.

The New Hampshire Department of Employment Security (NHDES) and the U.S. Department of Labor (USDOL) have filed exceptions to the Administrative Law Judge's recommended decision.

The U.S. Department of Labor has excepted to certain of the findings of fact on the issues of constitutionality contained in the Judge's recommended decision. The USDOL notes that findings nos. 6, 7, 8, and 9 (Rec. Dec., pp. 31-32) all incorporate cost estimates, and that such findings are based upon the affidavits of four New Hampshire state officials, Fowler, Buswell, Whalen, and Barry, which contain such estimates. The USDOL contends that the affidavits in question should be given no weight because, among other things, three of them contain no explanation of the assumptions or factors used to arrive at

their cost estimates, the fourth makes only a general reference to "our past experience, " and none of the four officials was present at the hearing and subject to cross-examination as to the basis for arriving at his cost estimate. For these and other reasons the USDOL argues that the affidavits are deficient, and therefore the findings of the Judge based upon them should be deleted. I agree. Accordingly, findings of fact nos. 6, 7, 8, and 9 on the issues of constitutionality contained in the Judge's recommended decision at pages 31-32, are deleted.

The USDOL takes exception to certain other findings on the issues of constitutionality which contain cost estimates. In its Statement of Exceptions (at pages 5-6, it states:

> Subparagraphs 3(1) and 4(a) of the 'Findings of Fact on the Issues of Constitutionality' (R.D. at 29, 30) contain cost estimates from the oral testimony of two New Hampshire officials: Robert Herlihy, Director of Merchandising and Accounts for the New Hampshire State Liquor Commission, and Daniel Durgin, Business Administrator for Supervisory Union 16 of Exeter, New Hampshire, and President of the New Hampshire School Administrator's Association. Both Mr. Herlihy and Mr. Dur-

gin testified that they based their cost estimates on the contributions method of financing, multiplying the number of employees in their respective governmental units times $6,000 times 2.7 percent. (Herlihy, Tr. at 147, 152; Durgin, Tr. at 158, 161, 166). This is the statutory formula for assessing contributions from new private employers under current New Hampshire law. (See Section 282.6 of the New Hampshire Unemployment Compensation Law (NHUCL)). These estimates ignore the fact that, even under the current NHUCL, employers with relatively low turnover can eventually earn an experience rating which enables them to make contributions at a tax rate of less than 2.7 percent. (See Section 282.6, D of the NHUCL). These estimates also ignore the fact that the state may enact a special contribution plan for governmental entities which may establish a standard rate for such entities which is less than 2.7 percent.

More importantly, neither Mr. Herlihy nor Mr. Durgin even attempted to make an estimate of the actual cost of coverage which would be incurred on a dollar-for-dollar reimbursement basis. As Dr. Van Erden testified, the formula used by these New Hampshire witnesses may indicate revenue to the state unemployment trust fund at a tax rate of 2.7 percent, but it does not indicate the likely actual cost of additional coverage. (Tr. at 322-325).

For the reasons just stated, the Department takes exception to subparagraphs 3(1) and 4(a) of the 'Findings of Fact on the Issues of Constitutionality." (R.D. at 29, 30). Therefore, subparagraphs 3(1) and 4(a) should be deleted.***

For the reasons stated in the Statement of Exceptions filed by the USDOL (at pages 5-6), which I find to be sound and persuasive, nos. 3(1) and 4(a) of the Findings of Fact on the Issues of Constitutionality, at pages 29-30 of the Recommended Decision, are deleted.

The USDOL takes exception to the Judge's failure to consider and make findings with regard to the testimony of three of its witnesses at the hearing, Mr. Rubin, Mr. Rosbrow, and Mr. Wasserman. It contends that a decision in this proceeding would be incomplete without a consideration of the evidence and expert opinions they presented, and findings based thereon. Therefore, the USDOL proposes the following additional findings of fact and conclusions of law relating to the issues of constitutionality (USDOL Statement of Exceptions, pp. 7-11):

Findings of Fact

1. Even if a student earned enough in a summer job to meet New Hampshire's financial eligibility tests, a full-time student would rarely meet the eligibility requirement that he or she be available for

and seeking permanent, full-time work. (US DOL) Proposed F/F 31; USDOL Posthearing Brief at 35-37).

2. The financial eligibility and rigorous availability requirements in the New Hampshire Unemployment Compensation Law act to reduce the number of former temporary, seasonal, and part-time state and local government employees who are likely to collect unemployment benefits. (USDOL Proposed F/F 32; USDOL Posthearing Brief at 37).

3. The amount of benefits payable to individuals with part-time and/or temporary work experience is not likely to be as high as the amount payable to former full-time, permanent employees. (USDOL Proposed F/F 33; USDOL Posthearing Brief at 37-38).

4. The extension of coverage to additional state and local government employees will not create any significant new record-keeping or administrative burdens for New Hampshire public employers. (USDOL Proposed F/F 34; USDOL Posthearing Brief at 39-40).

5. NHDES witnesses testified uniformly that the subject of unemployment compensation had never come up in their collective bargaining experience with New Hampshire public employees. Mr. Donald Wasserman, Research Director for the American Federation of State, County, and Municipal Employees (AFSCME), testified that he was aware of no jurisdiction other than in one occasion in the State of Delaware in which his union had attempted to negotiate coverage of unemployment compensation as part of a collective bargaining agreement. Instead, the union has treated such coverage as a legislative matter, not as a subject of collective bargaining. (Tr. at

463). This evidence shows that the extension of coverage provided for by the 1976 Amendments will not interfere with the employer-employee relationship in the public sector in New Hampshire, since unemployment compensation is generally not a subject of collective bargaining. (USDOL Proposed F/F 35; USDOL Posthearing Brief at 40).

6. Congress passed the 1976 Amendments as a matter of equity, in order to protect public as well as private sector employees against the risks of unemployment. (USDOL Proposed F/F 40; USDOL Posthearing Brief at 47).

7. The need of public employees for unemployment compensation is even greater than that of employees in the private sector. This is because, unlike the private sector, the public sector contains virtually no substitutes for unemployment compensation, such as severance pay or private supplemental unemployment benefits. For example, only one of some forty-odd AFSCME contracts in New Hampshire contains any kind of severance pay provision. Wages also tend to be higher in private sector than in the State and local government sector, so that the absence of unemployment compensation for public employees is not counter-balanced by higher wages (and thus the possibility of greater savings to act as a cushion against wage loss occasioned by unemployment). (USDOL Proposed F/F 41; USDOL Posthearing Brief at 48).

8. Any costs incident to the extension of coverage to additional state and local government employees are outweighed by the benefits to the newly covered employees themselves. (USDOL Proposed F/F 42; USDOL Posthearing Brief at 47-48).

Conclusions of Law

1. Due to New Hampshire's base period and benefit year, all the cost for FY 1978 and approximately one-half the cost for FY 1979 of extending coverage to state and local government employees could have been, at New Hampshire's option, covered by the Federal Government under the transition provision (Section 121) of the 1976 Amendments. (US DOL Proposed C/L 21; USDOL Posthearing Brief at 19).

2. Section 282.2, B of the New Hampshire Unemployment Compensation Law provides that an individual must have earned at least $1,200 during his base period, including at least $300 in each of two calendar quarters, to qualify for benefits. (USDOL Proposed C/L 22).

3. Section 282.3,D of the New Hampshire Unemployment Compensation Law provides that an unemployed individual is eligible for benefits only if "(h)e is available for and seeking permanent, full-time work for which he is qualified." (USDOL Proposed C/L 23).

4. The cost of Unemployment benefits for former Comprehensive Employment and Training Act (CETA) employees is borne by the Federal Government, not by state or local governments. (USDOL Proposed C/L 24; USDOL Posthearing Brief at 37; Tr. at 244).

5. The Federal Unemployment Tax Act (FUTA) permits state and local governments a number of financing options in meeting the cost of extending coverage to their employees. The two major financing options are the reimbursement method and the contribution method. FUTA requires that every conforming state offer its local governments the option of financing benefits by dollar-

for-dollar reimbursement of benefits actually paid, or through assessment of a payroll tax (contribution) at a set rate. (USDOL Proposed C/L 25; USDOL Posthearing Brief at 41-42; Tr. at 414-419).

6. A number of variations on the major options are also possible under FUTA. For example, a governmental unit could adopt a delayed reimbursement method, postponing the reimbursement until after the fiscal year in which benefits were paid. This would remove budgetary uncertainty for governments otherwise preferring reimbursement to contribution. Under the contribution method, a state could adopt a special, lower tax rate for public employers if unemployment tended to be lower in the public than in the private sector. Federal law would even allow the state itself to finance the cost of coverage for local governmental units, an approach which might commend itself if the state had greater financial resources and a more varied potential tax base than its political subdivisions. Such variations are wholly within the control of the state. (US DOL Proposed C/L 26; USDOL Posthearing Brief at 41-42; Tr. at 414-419).

7. In essence, FUTA requires that public and private sector employees be treated equally with regard to unemployment compensation coverage. However, factors such as qualifying wages, qualifying weeks of employment, eligibility requirements, disqualifications, weekly benefit amounts, and duration of benefits are all matters of state discretion and can be changed, if changed in a nondiscriminatory manner. (USDOL Proposed C/L 27; USDOL Posthearing Brief at 45-46; Tr. at 239-240).

8. FUTA does not require that all temporary, seasonal, and part-time employees be eligible for benefits; it merely forbids treating them differently in the public and private sectors. Thus, a state could adopt a stronger labor force attachment requirement for all workers, such as requiring a certain number of weeks of work during the base period. For example, the State of New York requires that an individual must have earned at least $40 in each of 20 different weeks during his base period to be eligible for benefits. This type of requirement makes it much more difficult for temporary workers to qualify for benefits than under New Hampshire's present law. (USDOL Proposed C/L 28; Tr. 419-423).

9. FUTA leaves New Hampshire, as well as each of the other states, free to reduce its costs and those of its political subdivisions to whatever extent it deems appropriate by modifying various provisions of its unemployment compensation law (such as the weekly benefit amount, duration of benefits, eligibility requirements, etc.), as long as in so doing it does not discriminate between public and private sector employees. USDOL Proposed C/L 29; USDOL Post-hearing Brief at 45-46).

Contrary to the views expressed in the NHDES Statement of Exceptions, I find that the additional findings of fact and conclusions of law relating to the issues of constitutionality which are proposed by the USDOL on pages 7-11 of its Statement of Exceptions and are set out above, are supported

by record, are in accordance with law, and are proper, and I adopt them as my own.

In addition to the proposed findings of fact and conclusions of law set out above, certain other proposed findings of fact offered by the USDOL were omitted from the Recommended Decision. The USDOL takes exception to these omissions, and proposes the following additional findings of fact relating to the issues of constitutionality (USDOL Statement of Exceptions, p. 12):

> 1. If New Hampshire had enacted a law conforming to the 1976 Amendments effective January 1, 1978, data supplied by NHDES indicates that such a law would have added some 35,000 newly covered state and local government employees, of whom some 62% would have been employed in full-time permanent positions. (USDOL Proposed F/F 28; USDOL Posthearing Brief at 34-35).
>
> 2. Evidence from the State of New Hampshire and the City of Manchester indicates that involuntary turnover in their full-time permanent positions is almost non-existent. (USDOL Proposed F/F 29; USDOL Posthearing Brief at 35).
>
> 3. Even for those newly covered employees who are in temporary or part-time positions, NHDES has not demonstrated what proportion of such employees would meet state eligibility requirements or what level of benefits such employees would draw. (USDOL Proposed F/F 30; USDOL Posthearing Brief at 35-36. In fact, USDOL requested

data from NHDES in interrogatories filed July 17, 1978; but it was never supplied.)

I find that such proposed findings in the three numbered paragraphs immediately above, are supported by the record, are proper, and I adopt them as my own.

Although the USDOL concurs in the cost findings contained in no. 17 of the Findings of Fact on the Issues of Constitutionality, (Rec. Dec., pp. 33-35), it states that this portion of the decision would be strengthened by an explanation of why Dr. Van Erden's cost estimates were accorded greater weight than those of Mr. Moak. The USDOL takes exception to this omission, and proposes the following additonal findings of fact with respect to the testimony of Mr. Moak, which would be inserted immediately after find no. 13, found on pages 32-33 of the Recommended Decision. (US DOL Statement of Exceptions, p. 13):

1. The cost estimate developed by Mr. Moak on behalf of NHDES was as follows:

FY 1977	$1,140,000
FY 1979	1,352,000
FY 1980	1,510,000

2. Mr. Moak reached his estimate by using New Hampshire data for 1977. Using 1977 data he developed a unit cost of coverage per state employee, which he then used to estimate costs for both state and local government employees in 1979 and 1980.

3. Mr. Moak's method seriously overstates the likely costs of the extension of coverage by using 1977 data for separations and for duration of benefits. Actual 1978 data shows both the insured unemployment rate (IUR) and the average duration of benefits have dropped significantly, and economic projections indicate both are likely to drop further or level off during fiscal years 1979 and 1980. Mr. Moak, in contrast, assumed a constant economic situation since 1977, and an assumption not reflected in actual data for 1978 or in generally accepted economic forecasts for 1979 and 1980. This assumption led him to a serious overestimate of the costs of additional coverage in those years. (See USDOL Proposed F/F 18-21, USDOL Posthearing Brief at 23-31).

In addition the USDOL urges that finding no. 17 (Rec. Dec. at p.33) should be amended to read, in pertinent part, as follows: "... I find and conclude that the projections and estimates of Dr. Van Erden are to be accorded the greater weight, due to the superiority of his methodology and his assumptions, in particular his consideration of actual data for 1978 and generally accepted economic forecasts for 1978 and 1979...".

Contrary to the position of the State of New Hampshire Department of Employment Security in its Statement of Exceptions, the additional findings with respect to Mr. Moak's testimony and cost extimates which have been proposed by the USDOL, as well as its proposed amendment of finding no. 17 concerning the reasons for the greater weight to be accorded Dr. Van Erden's estimates, as set out above, are supported by the record and are well founded, and they are hereby adopted.

The USDOL takes exception to the failure of the Recommended Decision to specify what weight, if any, was given to nationwide evidence offered at the hearing relating to the impact of the extension of unemployment insurance coverage to state and local government employees. The USDOL states (Statement of Exceptions, p. 14):

> The history of this New Hampshire conformity proceeding reveals a continuing dispute between the parties as to the admissibility of nationwide evidence. The presiding administrative law judge ruled such evidence admissible at the hearing, but it is unclear what weight, if any, he gave such evidence in his Recommended Decision. (The Recommended Decision appears to contain no

findings on such evidence.) USDOL, therefore, proposes the following additional finding of fact to clarify this issue:

> Nationwide data was admitted by the administrative law judge at the hearing over UDSOL objections. This evidence, in the form of both testimony and affidavits, tends to show that neither layoffs of public employees nor curtailments of government services have resulted from the extension of unemployment insurance coverage to state and local employees. (See USDOL Posthearing Brief at 32-33, 43-45; Exhibit ALJ-45.) However, since the instant proceeding involves conformity and its impact in New Hampshire, I find that nationwide evidence is entitled to little weight.

In my opinion, the additional finding of fact proposed by the USDOL with regard to nationwide evidence, as setout immediately above, is sound and proper, and it is adopted.

In its Statement of Exceptions, at pages 14-17, the USDOL takes exception to the treatment of conformity issues in the Recommended Decision (referred to in the exceptions as "R.D."), as follows:

> The 'Findings as to Conformity of New Hampshire Law to Federal Requirements,' R.D. at 10-13, paragraph 19-23(e), and the 'Conclu-

sions of Law on the Issues of Conformity,' R.D. at 13-23, paragraphs 2-7(e), are largely redundant. The 'Findings,' R.D. at 10-13, appear to be taken from USDOL's proposed conclusions of law #15-20c while the 'Conclusions, ' R.D. at 13-23, appear to be taken from USDOL's prehearing brief (p.3-19). However, certain discrepancies also exist. The 'Findings' omit USDOL proposed conclusions of law #18b, dealing with the treatment of aliens in a contiguous country, and #20a, dealing with the nonconformity of the NHUCL 'between-terms denial' provision during the months of November and December, 1977. The 'Conclusions' address the treatment of aliens in a contiquous country but again omit the 1977 conformity issue.

USDOL proposes the following resolution for the above difficuties. The ' Conclusions of Law on the Issues of Conformity', R.D. at 13-23, should be supplemented by the following additional conclusion of law:

> 7(f) The prior § 3304(a)(6)(A) of FUTA, as enacted by section 104(a) of P.L. 91-373, required an approved State law, effective January 1, 1972, to provide that--
>
> > (6)(A) compensation is payable on the basis of service to which section 3309 (a) (1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that, with resepect to service in an instructional, research, or principal administrative capacity for an institution of higher education to which section 3309 (a)(1) ap-

> plies, compensation shall not be payable based on such service for any week commencing during the period between two successive academic years (or, when the contract provides instead for a similar period between two regular but not successive terms, during such period) to any individual who has a contract to perform services in any such capacity for any institution or institutions of higher education for both of such academic years or both of such terms, and
>
> * * * * *

Although this provision of FUTA was superseded by the currently effective §3304(a)(6)(A) on January 1, 1978, it was effective until December 31, 1977. Under the above cited provision, for the period prior to January 1, 1978, 'between terms' denial could apply only to those individuals who performed services for a nonprofit or state institution of higher education in an instructional, research or principal administrative capacity (i.e., so-called 'professional' capacities). This provision did not authorize a between terms denial with respect to those who performed services for such an institution of higher education in a non-professional capacity.

Section 282:3,F of the NHUCL provides, effective July 1, 1977, than an employed individual shall be eligible to receive benefits with respect to any week only if the director finds that:

> F. He is not seeking benefits for any week commencing during summer or other vacation breaks, semester breaks, or any other time during which a school or other academic institution is not in session, between two successive academic years or terms or any other period, if he has a contract to perform, or there is a reasonable assurance that he will perform, professional or non-professional services in the second of such academic periods and he performed such services during the first of such academic periods.

The above quoted New Hampshire provision denies benefits to individuals who performed services in a nonprofessional capacity in the first of two academic periods if they seek benefits betwen the first and second academic periods and there is a contract or a reasonable assurance to perform nonprofessional or professional services in the second academic period. Such a denial under the 'between terms' denial provision is inconsistent with the 'equal treatment' requirement of §3304 (a) (6) (A) cited above. Thus, for November and December, 1977 the NHUCL failed to conform to the then effective §3304 (a) (6) (A) of FUTA because it does apply 'between terms' denial to non-professionals of such institutions.

I find that the USDOL's proposal is well founded.

Accordingly, an additional conclusion of law on

the issues of conformity, designated 7(f) and worded as set out above, is inserted immediately after conclusion 7(e) on page 23 of the Recommended Decision.

The USDOL makes the further proposal (on pages 17 and 18 of its Statement of Exceptions) that certain findings, designated 22(c) and 23 (f), be added to the Recommended Decision. I believe that such proposal is well founded. Accordingly, the following findings, designated 22(c) and 23(f), are hereby added to the findings as to conformity of New Hampshire's law to Federal requirements, contained in the Recommended Decision, immediately after findings 22(b) and 23 (e) on pages 12 and 13 of such decision, respectively:

> 22(c). Since there exists no provision in the NHUCL which expressly provides that benefits will not be denied or reduced solley for the reasons specified in § 3304(a) (9) (A) of FUTA, and since it is unclear from § 282:1, (N) (a) of the NHUCL whether or not the phrase 'under color of law' is broad enough to encompass individuals in a contiguous country with which the United States has an agreement with respect to unemployment compensation

and who have been temporarily admitted into the United States for the purpose of performing services, a finding cannot be made that the NHUCL, effective January 1, 1978, has been amended to contain a provision which meets the requirements of § 3304 (a) (9) (A) of FUTA. (USDOL Proposed C/L 18b).

23(f). Under § 3304 (a) (6) (A) of FUTA as enacted by section 104 (a) of P.L. 91-373, which was effective until December 31, 1977, a 'between terms' denial could apply only to those individuals who performed services for a nonprofit or state institution of higher education in an instructional, research or principal administrative capacity (i.e., so-called 'professional' capacities). This provision did not authorize a between terms denial with respect to those who performed services for such an institution of higher education in a non-professional capacity. Section 282:3,F of the NHUCL, which was effective July 1, 1977, denies benefits to indivuduals who performed services in a non-professional capacity in the first of two academic periods if they seek benefits between the first and second academic periods and there is a contract or a reasonable assurance to perform non-professional or professional services in the second academic period. Such a denial under the 'between terms' denial provision is inconsistent with the 'equal treatment' requirement of § 3304 (a) (6) (A). Thus, for November and December, 1977 the NHUCL fails to conform to the then effective §3304 (a) (6) (A) of FUTA because it does apply 'between terms' denial to nonprofessionals of such institutions. (USDOL Proposed C/L 20a).

On pages 18-22 of its Statement of Exceptions, the USDOL lists a number of minor errors in the Recommended Decision (R.D.) which appear to be inadvertent but which affect the substantive accuracy of the decision; it also lists a number of proposed changes in language to clarify meaning, and a number of typographical errors. The proposed changes and corrections, as described by the USDOL, all of which I find to be well founded, are hereby made as indicated below:

1. In R.D. at 2, first full paragraph, delete last sentence and substitute: 'The purpose of the 1976 Amendments was to extend Unemployment Insurance coverage to employees of states and political subdivisions and certain other employees.'

2. In R.D. at 3, numbered paragraph 4, fifth line, delete the word 'code' and substitute 'color.'

3. In R.D. at 6, numbered paragraph 1, delete 'January 24, 1978' and substitute 'February 24, 1978.'

4. In R.D. at 9, numbered paragraph 7, delete 'June 13, 1978' and substitute 'June 15, 1978'; insert after 'a correction to the Revised Rules' the additional

phrase 'dated September 14, 1978.'

5. In R.D. at 10, numbered paragraph 16, delete last sentence and substitute: 'Under current federal law, none of these revenues could be used in support of the nonconforming State's private sector unemployment compensation program.' Congress, of course, could pass new legislation to establish interim coverage of private and/or public sector employees in a nonconforming state. (USDOL Response to NHDES Supplemental Interogatory No. 2, ALJ Exh. 48, p.14).

6. In R.D. at 11, numbered paragraph 21, lines 4-6, delete material inside parentheses, and add 'and nonprofit organizations which are required by sections 3304 (a) (6) (A) and 3309 (a) (1) to be covered by the state unemployment compensation law.' In the same paragraph, line 10, after the word 'entities' add 'and nonprofit organizations.'

7. In R.D. at 17, numbered paragraph 4(b), fourth line, delete '3304(a) (b) (A)' and substitute '3304 (a) (6) (A).'

8. In R.D. at 20, numbered paragraph 6(b), fifth line, change the word 'services' at the beginning of the line to 'seasons.'

9. In R.D. at 33, numbered paragraph 17a, delete 'has been estimated' and substitute 'is likely to be'; delete '40,421' and substitute '40,241.'

10. In R.D. at 33, numbered paragraph 17b, delete 'has been estimated' and substitute 'is likely to be.'

11. In R.D. at 34, numbered paragraph 17(e), delete 'has been estimated' and substitute 'is likely to be.'

12. In R.D. at 34, numbered paragraph 17 (g), delete last sentence and substitute: 'A reasonable estimate, based on historical data, of the ratio between the IUR for covered state and local employees and the IUR for the regular program is .26.'

13. In R.D. at 35, top of page, delete '$227,585' and substitute '$277,585.'

14. In R.D. at 35, 'Recommendation,' delete entire paragraph and substitute: 'Based upon the foregoing findings of fact and conclusions of law, the Secretary of Labor hereby determines that the New Hampshire Unemployment Compensation Law fails to conform to the provisions of the Federal Unemployment Tax Act, as amended, with respect to each of the six numbered issues (and sub-issues included therein) listed in the Notice of Hearing at 43 F.R. 26500 (June 20, 1978).'

Typographical Errors

1. In R.D. at 4, numbered paragraph 5, change 'athlethic' to athletic.'

2. In R.D. at 5, top page, change 'virture' to 'virtue.'

3. In R.D. at 7, numbered paragraph 2, thirteenth line, change 'labor' to 'Labor.'

4. In R.D. at 11, numbered paragraph 22, second line, change 'confrom' to

'conform.

5. In R.D. at 11, numbered paragraph 22 (a), second line, change 'form' to 'from.'

6. In R.D. at 14, top of page, delete first line (which duplicates last line at bottom of p.13).

7. In R.D. at 16, numbered paragraph 3 (c), last line, remove one '§' sign.

8. In R.D. at 17, numbered paragraph 4 (b), ninth line of quotation, change 'and' to 'an.'

9. In R.D. at 18, top of page, thirteenth line, change 'of' to 'or.'

10. In R.D. at 19, numbered paragraph 5(f), tenth line, change period to comma.

11. In R.D. at 20, numbered paragraph 6(b), fifth and sixth lines, change 'substanitally' to 'substantially.'

Additional typographical errors in the Recommended Decision which I have noted are hereby corrected, as follows:

1. On page 19, in paragraph 5(d), in the first line of the quotation of the provisions of Section 3304 (a) (9) (A) of FUTA, insert 'be' after 'shall not.'

2. On the same page of the Rec. Dec., in paragraph 5 (e), in the last line of the quoted provision, change

'color law' to read 'color of law.'

3. On page 34, in paragraph 17 (g), in the first line change 'uninsured' to 'insured' and in paragraph 17 (h), after 'Additional CE' delete the dollar signs before the figures 35,148, 37,609 and 40,241.'

I have carefully studied all the evidence in the record and have considered all the arguments presented with respect to the issues, including the exceptions to the Judge's recommended decision dated October 13, 1978. It is my conclusion that, except as indicated herein above, the findings of fact and conclusions of of law of the Judge with respect to the conformity issues which are contained in such decision, are supported by the evidence in the record, are in accordance with applicable law, and are proper, and I adopt them as my own.

Accordingly, I find that the New Hampshire Unemployment Compensation Law fails to conform to the provisions of the Federal Unemployment Tax Act, as amended, with respect to each of the six numbered issues (and sub-issues included

therein) listed in the Notice of Hearing at 43 F.R. 26500 (June 20, 1978).

I find, further, that except as indicated herein above, the findings of fact bearing on the issues of constitutionality which the Administrative Law Judge made in his recommended decision of October 13, 1978, are supported by the evidence in the record and are proper, and I adopt them as my own.

Dated at Washington, D.C.
this _____day of October, 1978.

_____
Secretary of Labor

FEDERAL STATUTES INVOLVED

26 U.S.C. §3301

§3301. RATE OF TAX

There is hereby imposed on every employer (as defined in section 3306(a)) for each calendar year an excise tax, with respect to having individuals in his employ, equal to-

(1) 3.4 percent, in the case of a calendar year beginning before the first calendar year after 1976, as of January 1 of which there is not a balance of repayable advances made to the extended unemployed compensation account (established by section 905(a) of the Social Security Act); or

(2) 3.2 percent, in the case of such first calendar year and each calendar year thereafter;

of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

Aug. 16, 1954, c. 736, 68A Stat. 439; Sept. 13, 1960, Pub.L. 86-778, Title V, §523(a), 74 Stat. 980; Mar. 24, 1961, Pub.L. 87-6, §14(a), 75 Stat. 16; May 29, 1963, Pub.L. 88-31, §2(a), 77 Stat. 51; Aug. 10, 1970, Pub.L. 91-373, Title III, §301(a), 84 Stat. 713; June 30, 1972, Pub. L. 92-329, §2(a), 86 Stat. 398; Oct. 4, 1976, Pub.L. 94-455, Title XIX, §1903(a)(11), 90

Stat. 1808; Oct. 20, 1976, Pub.L. 94-566, Title II, §211(b), 90 Stat. 2676.

26 U.S.C. §3302

§3302. CREDITS AGAINST TAX

(a) Contributions to state unemployment funds.-

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 3301 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified as provided in section 3304 for the 12-month period ending on October 31 of such year.

(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 6071 to file a return for such year; except that credit shall be permitted for contributions paid after such last day, but such credit shall not exceed 90 percent of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last day.

(4) Upon the payment of contributions into the unemployment fund of a State which are required under the unemployment compensation

law of that State with respect to remuneration on the basis of which, prior to such payment into the proper fund, the taxpayer erroneously paid an amount as contributions under another unemployment compensation law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made on the date the return for the taxable year was filed under section 6071.

(b) Additional credit.-In addition to the credit allowed under subsection (a), a taxpayer may credit against the tax imposed by section 3301 for any taxable year an amount, with respect to the unemployment compensation law of each State certified as provided in section 3303 for the 12-month period ending on October 31 of such year, or with respect to any provisions thereof so certified, equal to the amount, if any, by which the contributions required to be paid by him with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to the highest rate applied thereunder in such 12-month period to any person having individuals in his employ, or to a rate of 2.7 percent, whichever rate is lower.

(c) Limit on total credits.-

(1) The total credits allowed to a taxpayer under this section shall not exceed 90 percent of the tax against which such credits are allowable.

(2) If an advance or advances have been made to the unemployment account of a State under title XII of the Social Security Act, then the total credits (after applying subsections (a) and (b) and paragraph (1) of this subsection) otherwise allowable under this section for the taxable year in the case of a taxpayer subject to the unemployment compensation law of such State shall be reduced-

(A)(i) in the case of a taxable year beginning with the second consecutive January 1 as of the beginning of which there is a balance of such advances, by 10 percent of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State; and

(ii) in the case of any succeeding taxable year beginning with a consecutive January 1 as of the beginning of which there is a balance of such advances, by an additional 10 percent, for each such succeeding taxable year, of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State;

(B) in the case of a taxable year beginning with the third or fourth consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by

such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which-

(i) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year; and

(C) in the case of a taxable year beginning with the fifth or any succeeding consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which-

(i) the 5-year benefit cost rate applicable to such State for such taxable year or (if higher) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year.

The provisions of the preceding sentence shall not be applicable with respect to the taxable year beginning January 1, 1975, or any succeeding taxable year which begins before January 1, 1980; and, for purposes of such sentence, January 1, 1980, shall be deemed to be the first January 1 occurring after January 1, 1974, and consecutive taxable years in the period commencing January 1, 1980, shall be determined as if the taxable year which begins on January 1, 1980, were the taxable year immediately succeeding the taxable year which

began on January 1, 1974.

(3) If the Secretary of Labor determines that a State, or State agency, has not-

(A) entered into the agreement described in section 239 of the Trade Act of 1974, with the Secretary of Labor before July 15, 1975, or

(B) fulfilled its commitments under an agreement with the Secretary of Labor as described in section 239 of the Trade Act of 1974,

then, in the case of a taxpayer subject to the unemployment compensation law of such State, the total credits (after applying subsections (a) and (b) and paragraphs (1) and (2) of this section) otherwise allowable under this section for a year during which such State or agency does not enter into or fulfill such an agreement shall be reduced by 15 percent of the tax imposed with respect to wages paid by such taxpayer during such year which are attributable to such State.

(d) Definitions and special rules relating to subsection (c).-

(1) Rate of tax deemed to be 3 percent.- In applying subsection (c), the tax imposed by section 3301 shall be computed at the rate of 3 percent in lieu of the rate provided by such section.

(2) Wages attributable to a particular state.-For purposes of subsection (c), wages shall be attributable to a particular State if

they are subject to the unemployment compensation law of the State, or (if not subject to the unemployment compensation law of any State) if they are determined (under rules or regulations prescribed by the Secretary) to be attributable to such State.

(3) Additional taxes inapplicable where advances are repaid before November 10 of taxable year.-Paragraph (2) of subsection (c) shall not apply with respect to any State for the taxable year if (as of the beginning of November 10 of such year) there is no balance of advances referred to in such paragraph.

(4) Average employer contribution rate.- For purposes of subparagraphs (B) and (C) of subsection (c)(2), the average employer contribution rate for any State for any calendar year is that percentage obtained by dividing-

(A) the total of the contributions paid into the State unemployment fund with respect to such calendar year, by

(B) the total of the remuneration subject to contributions under the State unemployment compensation law with respect to such calendar year.

For purposes of subparagraph (C) of subsection (c)(2), if the average employer contribution rate for any State for any calendar year (determined without regard to this sentence) equals or exceeds 2.7 percent, such rate shall be determined by increasing the amount taken into account under subparagraph (A) of the preceding sentence by the aggregate amount of employee payments (if any)

into the unemployment fund of such State with respect to such calendar year which are to be used solely in the payment of unemployment compensation.

(5) 5-year benefit cost rate.-For purposes of subparagraph (C) of subsection (c)(2), the 5-year benefit cost rate applicable to any State for any taxable year is that percentage obtained by dividing-

(A) one-fifth of the total of the compensation paid under the State unemployment compensation law during the 5-year period ending at the close of the second calendar year preceding such taxable year, by

(B) the total of the remuneration subject to contributions under the State unemployment compensation law with respect to the first calendar year preceding such taxable year.

(6) Rounding.-If any percentage referred to in either subparagraph (B) or (C) of subsection (c)(2) is not a multiple of .1 percent, it shall be rounded to the nearest multiple of .1 percent.

(7) Determination and certification of percentages.-The percentage referred to in subsection (c)(2)(B) or (C) for any taxable year for any State having a balance referred to therein shall be determined by the Secretary of Labor, and shall be certified by him to the Secretary of the Treasury before June 1 of such year, on the basis of a report furnished by such State to the Secretary of Labor before May 1 of such year.

Any such State report shall be made as of the close of March 31 of the taxable year, and shall be made on such forms, and shall contain such information, as the Secretary of Labor deems necessary to the performance of his duties under this section.

(e) Successor employer.-Subject to the limits provided by subsection (c), if-

(1) an employer acquires during any calendar year substantially all the property used in the trade or business of another person, or used in a separate unit of a trade or business of such other person, and immediately after the acquisition employs in his trade or business one or more individuals who immediately prior to the acquisition were employed in the trade or business of such other person, and

(2) such other person is not an employer for the calendar year in which the acquisition takes place, then, for the calendar year in which the acquisition takes place, in addition to the credits allowed under subsections (a) and (b), such employer may credit against the tax imposed by section 3301 for such year an amount equal to the credits which (without regard to subsection (c)) would have been allowable to such other person under subsections (a) and (b) and this subsection for such year, if such other person had been an employer, with respect to remuneration subject to contributions under the unemployment compensation law of a State paid by such other person to the individual or individuals described in paragraph (1).

Aug. 16, 1954, c. 736, 68A Stat. 439; Sept. 13, 1960, Pub.L. 86-778, Title V, §523(b), 74 Stat. 980; Mar. 24, 1961, Pub.L. 87-6, §14(b), 75 Stat. 16; Sept. 26, 1961, Pub.L. 87-321, §1(a), 75 Stat. 683; May 29, 1963, Pub.L. 88-31, §2(b), 77 Stat. 51; Nov. 7, 1963, Pub.L. 88-173, §1(a-c), 77 Stat. 305; Aug. 10, 1970, Pub.L. 91-373, Title I, §142(a), (b), 84 Stat. 707; Jan. 3, 1975, Pub. L. 93-618, Title II, §239(e), 88 Stat. 2025; June 30, 1975, Pub.L. 94-45, Title I, §110(a), Title III, §302, 89 Stat. 239, 243; Oct. 4, 1976, Pub.L. 94-455, Title XIX, §§1903(a)(12), 1906(b)(13)(A), 90 Stat. 1808, 1834; Apr. 12, 1977, Pub. L. 95-19, Title II, §201(a), 91 Stat. 43.

26 U.S.C. §3304

§3304. APPROVAL OF STATE LAWS

(a) Requirements.-The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that-

(1) all compensation is to be paid through public employment offices or such other agencies as the Secretary of Labor may approve;

(2) no compensation shall be payable with respect to any day of unemployment occurring within 2 years after the first day of the first period with respect to which contributions are required;

(3) all money received in the unemployment fund shall (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section

3305 (b)) immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904 of the Social Security Act (42 U.S.C. 1104);

(4) all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that-

(A) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration; and

(B) the amounts specified by section 903 (c)(2) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices;

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that-

(i) with respect to services in an instructional, research, or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms,

(ii) with respect to services in any other capacity for an educational institution

(other than an institution of higher education) to which section 3309(a)(1) applies, compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms,

(iii) with respect to any services described in clause (i) or (ii), compensation payable on the basis of such services may be denied to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess, and

(iv) with respect to any services described in clause (i) or (ii), compensation payable on the basis of services in any such capacity may be denied as specified in clauses (i), (ii), and (iii) to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively

for the purpose of providing such services to one or more educational institutions, and

(B) payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in section 3309(a)(2);

(7) an individual who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit year;

(8) compensation shall not be denied to any individual for any week because he is in training with the approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work);

(9)(A) compensation shall not be denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation;

(B) the State shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under the State law with his wages and employment covered under the unemployment compensation law of other States which are approved by the Secretary of Labor in

consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations. Any such arrangement shall include provisions for (i) applying the base period of a single State law to a claim involving the combining of an individual's wages and employment covered under two or more State laws, and (ii) avoiding duplicate use of wages and employment by reason of such combining;

(10) compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income;

(11) extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970;

(12) no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy;

(13) compensation shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons (or similar periods) if such individual performed such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the later of such

seasons (or similar periods);

(14)(A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act),

(B) any data or information required of individuals applying for compensation to determine whether compensation is not payable to them because of their alien status shall be uniformly required from all applicants for compensation, and

(C) in the case of an individual whose application for compensation would otherwise be approved, no determination by the State agency that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence;

(15) the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below

zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week;

(16)(A) wage information contained in the records of the agency administering the State law which is necessary (as determined by the Secretary of Health, Education, and Welfare in regulations) for purposes of determining an individual's eligibility for aid or services, or the amount of such aid or services, under a State plan for aid and services to needy families with children approved under part A of title IV of the Social Security Act, shall be made available to a State or political subdivision thereof when such information is specifically requested by such State or political subdivision for such purposes, and

(B) such safeguards are established as are necessary (as determined by the Secretary of Health, Education, and Welfare in regulations) to insure that such information is used only for the purposes authorized under subparagraph (A);

(17) all the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

(b) Notification.-The Secretary of Labor shall, upon approving such law, notify the governor of the State of his approval.

(c) Certification.-On October 31 of each taxable year the Secretary of Labor shall certify to the Secretary of the Treasury each State whose law he has previously approved, except that he shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has amended its law so that it no longer contains the provisions specified in subsection (a) or has with respect to the 12-month period ending on such October 31 failed to comply substantially with any such provision in such subsection. No finding of a failure to comply substantially with any provision in paragraph (5) of subsection (a) shall be based on an application or interpretation of State law (1) until all administrative review provided for under the laws of the State has been exhausted, or (2) with respect to which the time for judicial review provided by the laws of the State has not expired, or (3) with respect to which any judicial review is pending. On October 31 of any taxable year after 1971, the Secretary of Labor shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has failed to amend its law so that it contains each of the provisions required by reason of the enactment of the Employment Security Amendments of 1970 to be included therein, or has with respect to the 12-month period ending on such October 31, failed to comply substantially with any such provision. On October 31 of any taxable year after 1977, the Secretary shall not certify any State which, after reasonable notice and opportunity for a hearing to the State agency, the Secretary of Labor finds has failed to amend its law so that it contains each of the provisions required by reason of the enactment of

the Unemployment Compensation Amendments of 1976 to be included therein, or has with respect to the 12-month period ending on such October 31, failed to comply substantially with any such provision.

(d) Notice of noncertification.-If at any time the Secretary of Labor has reason to believe that a State whose law he has previously approved may not be certified under subsection (c), he shall promptly so notify the governor of such State.

(e) Change of law during 12-month period.-Whenever-

(1) any provision of this section, section 3302, or section 3303 refers to a 12-month period ending on October 31 of a year, and

(2) the law applicable to one portion of such period differs from the law applicable to another portion of such period,

then such provision shall be applied by taking into account for each such portion the law applicable to such portion.

(f) Definition of institution of higher education.-For purposes of subsection (a)(6), the term "institution of higher education" means an educational institution in any State which-

(1) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(2) is legally authorized with such State

to provide a program of education beyond high school;

(3) provides an educational program for it which awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, or offers a program of training to prepare students for gainful employment in a recognized occupation; and

(4) is a public or other nonprofit institution.

Aug. 16, 1954, c. 736, 68A Stat. 443; Aug. 10, 1970, Pub.L. 91-373, Title I, §§104(a), 108(a), 121(a), 131(b)(2), 142(f)-(h), Title II, §206, 84 Stat. 697, 701, 704, 707, 708, 712; Oct. 4, 1976, Pub.L. 94-455, Title XIX, §1903(a)(14), 1906(b)(13)(C), (E), 90 Stat. 1809, 1834; Oct. 20, 1976, Pub.L. 94-566, Title I, §115(c)(1), (5), Title III, §§312(a), (b), 314(a), Title V, §506(b), 90 Stat. 2670, 2671, 2679, 2680, 2687; Apr. 12, 1977, Pub.L. 95-19, Title III, §302(a), (c), (e), 91 Stat. 44, 45; Nov. 12, 1977, Pub.L. 95-171, §2(a), 91 Stat. 1353; Dec. 20, 1977, Pub.L. 95-216, Title IV, §403(b), 91 Stat. 1561.

26 U.S.C. §3306 (c)

(c) Employment.-For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for

the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aricraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3)), except,-

(1) agrigultural labor (as defened in subsection (k)) unless-

(A) such labor is performed for a person who-

(i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor (not taking into account labor performed before January 1, 1980, by an alien referred to in subparagraph (B)), or

(ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (not taking into account labor performed before January 1, 1980, by an alien referred to in sub-

paragraph (B)) for some portion of the day whether or not at the same moment of time) 10 or more individuals; and

(B) such labor is not agricultural labor performed before January 1, 1980, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

(2) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for a person who paid cash remuneration of $1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if-

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or

(B) such individual was regularly employed (as determined under subparagraph (A)) by

such employer in the performance of such service during the preceding calendar quarter;

(4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

(5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is-

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivision; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);

(10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than $50, or

(B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance, or

(C) service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its

educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers, or

(D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a non-diplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government-

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;

(14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(15)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an international organization;

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except-

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States); or

(18) Service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101 (a) (15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101 (a)(15) (F) or (J)), and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be.

26 U.S.C. §3309

§3309 STATE LAW COVERAGE OF SERVICES PERFORMED FOR NONPROFIT ORGANIZATIONS OR GOVERNMENTAL ENTITIES

(a) STATE LAW REQUIREMENTS. - For purposes of section 3304 (a) (6) -

(1) except as otherwise provided in

subsections (b) and (c), the services to which this paragraph applies are -

(A) service excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c), and

(B) service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c); and

(2) the State law shall provide that a governmental entity or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

(b) SECTION NOT TO APPLY TO CERTAIN SERVICE. - This section shall not apply to service performed -

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) by duly ordained, commissioned, or licensed minister of a church in the exercise

of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a governmental entity referred to in paragraph (7) of section 3306(c), if such service is performed by an individual in the exercise of his duties -

(A) as an elected official;

(B) as a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof;

(C) as a member of the State National Guard or Air National Guard;

(D) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or

(E) in a position which, under or pursuant to the State law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week;

(4) in a facility conducted for the purpose of carrying out a program of -

(A) rehabilitation for individuals who earning capacity is impaired by age or physical or mental deficiency or injury, or

(B) providing remunerative work for individuals who because of their

impaired physical or mental capacity cannot be readily absorbed in the competitive labor market,

by an individual receiving such rehabilitation or remunerative work;

(5) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual receiving such work relief or work training; and

(6) by an inmate of a custodial or penal institution.

(c) NONPROFIT ORGANIZATIONS MUST EMPLOY 4 OR MORE. - This section shall not apply to service performed during any calendar year in the employ of any organization unless on each of some 20 days during such calendar year or the preceding calendar year, each day being in a different calendar week, the total number of individuals who were employed by such organization in employment (determined without regard to section 3306(c) (8) and by excluding service to which this section does not apply by reason of subsection (b)) for some portion of the day (whether or not at the same moment of time) was 4 or more.

Added Pub.L. 91-373, Title I, §104(b) (1), Aug. 10, 1970, 84 Stat. 697, and amended Pub.L. 94-566, Title I, §115 (a), (b) (c) (2), (3),

26 U.S.C. §3310

§3310 JUDICIAL REVIEW

(a) IN GENERAL. - Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary of Labor. The Secretary of Labor thereupon shall file in the court the record of the proceedings on which he based his action as provided in section 2112 of title 28 of the United State Code.

(b) FINDINGS OF FACT. - The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary of Labor to take further evidence, and the Secretary of Labor may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) JURISDICTION OF COURT; REVIEW. - The court shall have jurisdiction to affirm the action of the Secretary of Labor or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(d) STAY OF SECRETARY OF LABOR'S ACTION. -

(1) The Secretary of Labor shall not with-

hold any certification under section 3303 (b) or section 3304(c) until the expiration of 60 days after the Governor of the State has been notified of the action referred to in subsection (a) or until the State has filed a petition for review of such action, whichever is earlier.

(2) The commencement of judicial proceedings under this section shall stay the Secretary of Labor's action for a period of 30 days, and the court may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights.

(e) PREFERENCE. - Any judicial proceedings under this section shall be entitled to, and, upon request of the Secretary of Labor or the State, shall receive a preference and shall be heard and determined as expeditiously as possible.

Added Pub.L. 91-373, Title I, § 131(b) (1), Aug. 10, 1970, 84 Stat. 703, and amended Pub. L. 94-455, Title XIX, § 1906(b) (13) (F), (H), Oct. 4, 1976, 90 Stat. 1835.

NEW HAMPSHIRE UNEMPLOYMENT COMPENSATION LAW

RSA 282: 1-H (4)

(4) The term "employment" shall not include:...

RSA 282: 1-H (4) (g)

(g) Service performed in the employ of any state other than this state or of any of political subdivisions of such other state or of any instrumentality of such other state, or of any town, city or other political subdivision of this state unless such town, city or other political subdivision of this state elects to become subject under section 7 of this chapter; (1971, 156:4, effective 4/1/71)

RSA 282: 1-H (4) (q) (r) (s)

(q) Service performed for this state by any individual who is not a classified employee in the state classified service; except that this provision shall not apply to service performed by an individual in the employ of a state hospital and/or an institution of higher education; (1971, 156:9, effective 1/1/72)

(r) Service performed by seasonal or temporary classified employees as herein defined. Seasonal classification in the state employment classification system shall mean service in a position the need for which may be reasonably anticipated as likely to recur each year for a varying period of time. Temporary classification in the state employment classification system shall mean service of a qualified person to a position that is known to be of limited duration. This provision shall not apply to service performed by an individual in the employ of a state hospital and/or an institution of higher education. (1971, 156:10, effective 1/1/72)

(s) The following services performed in the employ of an organization described in section 501 (c)(3) and exempt under section 501 (a) of the Internal Revenue Code:

RSA 282: 1-H (4) (s) (1) (2) (3) (4) (5) (6)

(1) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

(2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) in the employ of a school which is not an institution of higher education; or

(4) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competative labor market by an individual receiving such rehabilitation or remunerative work; or

(5) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training; or

(6) for a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution. (1971, 156:11, effective 1/1/72)

RSA 282: 1-N (1) (a)

N. "Wages" means every form of remuneration for personal services paid or payable to a person directly or indirectly, by his employing unit, including salaries, commissions, bonuses, and the reasonable value of board, rent, housing, lodging, payment in kind and similar advantages estimated and determined in accordance with the rules of the commissioner of the department of employment security. (1977, 441:6 effective 1/1/78)

(1) The term "wages" shall not include:

(a) The amount of any payment to an alien unless said individual was, at the time he performed services, in the United States of America under color of law. (1977, 441:12, effective 1/1/78)

RSA 282: 1-O

O. "Annual earnings" shall be the wages, to the nearest dollar, earned during each base period from an employer by an individual in employment in New Hampshire and an amount equivalent to the average weekly wage, as determined under the New Hampshire Workmen's Compensation statute, for each week that an individual has been found by either the labor commissioner or a court to be entitled to receive workman's compensation based on a claim involving such an employer. Annual earnings shall be reduced by all wages for services

in training preparation to participate or participation in sports or athletic events with respect to any weekly benefit amount for a week of total or partial unemployment during the period between successive sport seasons for any individual so engaged in the first of such seasons if there is a reasonable assurance of such performance in the second. Services as parking lot attendants, ushers, ticket sellers, and cafeteria workers shall be excluded from this provision. (1977, 441:7, effective 1/1/78)